If the tender were offered to respondent solely, it would merely mean that he would not have to share the profit with anyone. It was an isolated transaction in the sense that respondent carried on timber business jointly with Voo Khen for the first time, but that did not in any way affect the nature of their business. The only difference is that the profit arising from the transaction was to be shared by them. The transaction involved was still the sale of timber.

The finding of the Special Commissioners on purely questions of fact should not be disturbed unless it was so perverse that, as a matter of law, it could not stand. In *Rellim Ltd.* v. *Vise*[6] Wynn-Parry J. made these observations: —

"The principles of law which govern this case are perfectly clear; and as the matter strikes me it is one which upon examination will be found to raise no more than a very short question — short but not thereby easy to answer — namely whether or not the Commissioners had evidence before them upon which they could properly make the finding which they did. The Commissioner's finding is expressed in these words: 'We, the Commissioners who heard the appeal, found that the company was a trading company with trading profits.' In my view that is a perfectly clear finding and is not open to the same sort of doubt to which the first finding of the Commissioners in the case of *Leeming* v. *Jones*[7] was open. Thus, one is faced at once with the crucial question in the case: Is it possible to say that there was no evidence upon which the Commissioners could properly base that finding?

....

... I have to bear in mind (for this has been laid down in many cases) that not merely is the question one of fact, but in deciding whether or not there is any evidence to support the Commissioners' finding, it is not for the court to consider how the court itself would have viewed the matter had it been *res integra*. If left free I might well have come to a different conclusion from that to which the Commissioners have come; but unless I can be satisfied that there was no evidence to support their finding, then I am bound to give effect to it."

There is nothing to suggest that the Special Commissioners have misdirected themselves in law. The finding of facts by the Special Commissioners should not be lightly disturbed even though on the materials the court might not have come to the same conclusion. Lord Atkinson in *Great Western Railway Company* v. *Bater*[8] put the position of the Commissioners clearly at page 244: —

"... Their determinations of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs."

I cannot say that on the evidence before them the Commissioners could not, as reasonable men, have come to the conclusion which they did. Section 9 of the Sabah Income Tax Ordinance, 1956 relates to the nature of the activity and not to the constitution of the business, e.g. whether the taxpayer was conducting such activity alone or in conjunction with others. The learned judge erred in not deciding whether the transaction was part of the business carried on by the taxpayer.

I would allow the appeal.

Appeal allowed.

Solicitors: *Thomas Jayasuriya & Co.*

SYARIKAT SOON THEAM SDN. v. H'NG CHYE JIN

[O.C.J. (Chang Min Tat J.) October 3, 1974]
[Penang — Civil Suit No. 187 of 1973]

Stock Exchange — Purchase of shares — Role of stock-broker — Obligations of purchasers — Mitigation.

A share-broker is by his designation not a contracting party but is an agent who arranges for the "marriage" of an order to buy with an order to sell.

Once a broker has received an order from his client, his authority to complete it and so rid himself of the personal liability undertaken by him within the rules of the Stock Exchange cannot be revoked. The authority could only be revoked before it had been acted upon.

A broker who had bought shares for his client is under no obligation to re-sell them.

[Editorial Note: Reference may be made to *Macphail & Co. (Ipoh) Ltd.* v. *Oam Prakash* [1969] 2 M.L.J. 19.]

Cases referred to:-

(1) *Taylor* v. *Stray* (1857) 2 C.B.N.S. 175; 140 E.R. 380.
(2) *Seymour* v. *Bridge* (1885) 14 Q.B.D. 460.
(3) *Fletcher* v. *Marshall* (1846) 15 M. & W. 755; 153 E.R. 1055.
(4) *Thacker* v. *Hardy* (1878) 4 Q.B.D. 685 C.A.

CIVIL SUIT.

Philip Hoalim Jr. for the plaintiff.

Ariffin bin Haji Daud for the defendant.

Chang Min Tat J.: The plaintiff is a firm of share-brokers and is claiming from the defendant $13,103.00 which is the difference between the purchase price of the 10,000 Haw Par Bros. (International) Limited shares, said to be bought by the plaintiff for the defendant and subsequently sold by the plaintiff as a result of the failure of the defendant to take up the shares.

The defence was that the defendant had never at any time placed the order for the purchase of such shares.

It is common ground that the shares were purchased on the 29 March 1973. It is also agreed between the parties that a few days before this date the defendant was introduced to Yeo Khee Nam, a director of the plaintiff firm.

The evidence of what actually transpired on the 29 March is at variance. The director, Yeo Khee Nam, alleged that before trading commenced that day the defendant appeared at his administrative room and there placed an order for 10,000 Haw Par at best. When trading opened at 10.00 a.m. he passed this order to his operator Ong Liang Thye who was in charge of the centralised buying and selling of shares for the firm. This Ong Liang Thye placed the order with the Kuala Lumpur Stock Exchange. The director also rang up the Singapore Stock Exchange to check prices. In the course of this telephone communication, he managed to obtain 3,000 Haw Par at $8.65¢. He notified the defendant who according to him accepted the purchase but told him not to proceed with the purchase of the balance. Yeo Khee Nam then told the defendant that before he could cancel the order he had to confirm that the order had not been executed. But he was informed by Ong Liang Thye that the Kuala Lumpur representative had bought the remain-

ing shares. In his evidence Yeo Khee Nam said the defendant objected to the purchase.

The defendant however contended seriously that he never saw the director in his administrative room and never placed any order or ordered the purchase at best, and suggested that his excursion to the trading room of the plaintiff that day with his father was for the purpose of amusement, to see how trading was done.

The evidence of the director supported as it was by the evidence of his staff, in my view, establishes clearly that the firm had in fact bought 11,000 Haw Par shares. This came about because their representative at Kuala Lumpur without knowing that 3,000 had already been bought in Singapore proceeded to fulfil the order of 10,000. By the time he was informed he had already got 8,000. This meant that the firm had to take up the excess of 1,000 and this is clearly shown in their books. These purchases were in fact amongst the earliest made by his firm that day. It was also a day of fairly active trading.

The defence of denial means essentially that the plaintiff firm had bought a considerable number of shares at a fairly substantial price without a firm order or any order. I think it is sufficient to say that in this light and in the light of reasonableness and inherent probability, the defence must seem to be not only improbable but also untrue.

However a consideration of the defence evidence must lend, in my view, support for the contention of the plaintiff. Surely the purpose of the defendant's introduction to the director of the plaintiff firm could be for no other purpose than to secure his acceptance by the plaintiff firm as a client. Then the ostensible purpose of the pleasure excursion to the trading room was itself contradicted by the defence admission that if the prices were right they would have bought shares. The father of the defendant who claimed to be an innocent in the share market admitted to reading the newspapers for share prices and the defendant himself admitted telling the director of the plaintiff firm that if the price was right his father might be interested in buying 10,000 shares in either Haw Par or Sime Darby. He however said that he would not consider any prices exceeding $8. But the evidence was that the prevailing price on the previous day was $8.60 and it must be completely unreal for any speculator in a market from which the bottom had not yet fallen to expect a substantial drop from $8.60 to $8 the next morning. On the other hand, there is the evidence that a bonus issue of 1 for 4 in Haw Par had been announced and a dividend declared. Yeo Khee Nam was of the opinion that the Haw Par shares were at that time in active demand. It might be that the bonus issue and the dividend had been discounted in the relatively high price prevailing, but there was no reason whatsoever as far as I could see for any expectation of a dramatic drop in the price of this particular share.

There is also the evidence by the plaintiff that the defendant and his father waited in the trading room till after the morning session had closed. The clerk PW2 said during this break she delivered the contract notes to the defendant and at his request explained to him how the prices were arrived at. The defendant said that he waited for the purpose of telling Yeo Khee Nam that he did not want the shares. But the undeniable fact was that he accepted the contract notes though the evidence of how and why he did so varied. On the evidence I find myself leaning in favour of the clerk and I accept her evidence that there was no objection to the contracts or acceptance under protest as being the truth.

On the evidence I therefore came to a finding of fact that the defendant did place an order for 10,000 Haw Par at best with the plaintiff firm.

The defence was based on the contract law of offer and acceptance and it was submitted that in the absence of any acceptance of the offer there was no valid contract between the plaintiff and the defendant by which the defendant was obliged to take up the shares. It was also said that the plaintiff owed a duty to the defendant to mitigate the loss and should, immediately on the notice that the defendant objected to the transaction, have sold the shares.

With very great respect, I am of the opinion that the submission at law is not well-founded. A share-broker is by his designation not a contracting party but is an agent who arranges for the "marriage" of an offer to buy with an offer to sell. For this brokerage he gets a commission. *Taylor* v. *Stray*[1] and *Seymour* v. *Bridge*[2] are, I consider, sufficient authorities for the proposition that once a broker had received an order from his client, his authority to complete it and so rid himself of the personal liability undertaken by him within the rules of the stock exchange cannot be revoked. The authority could of course always be revoked at any time before it had been acted upon: see *Fletcher* v. *Marshall*.[3]

The evidence however in this case is that the authority had already been acted upon before the revocation of the order for the 7,000 balance and therefore the defendant is bound.

Insofar as mitigation is concerned, on the authority of *Thacker* v. *Hardy*,[4] the broker who had bought securities for his client is under no obligation to re-sell them.

There will therefore be judgment for the plaintiff as prayed with costs.

Judgment for the plaintiff.

Solicitors: *Sharikat Goh Guan Ho; Ariffin & Co.*